No. 2336

In the United States Circuit Court of Appeals

For the Ninth Circuit

HAMILTON TRUST COMPANY, a Corporation,
Plaintiff and Appellant,
vs.
THE CORNUCOPIA MINES COMANY of Oregon,
Defendant and Appellant,
JOHN L. BISHER, JR., by John L. Bisher, his Guardian ad Litem,
Intervener and Appellee.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE.

I.

On the 5th day of December, 1911, complainant Hamilton Trust Company commenced a suit in equity in the District Court of the United States for the District of Oregon against The Cornucopia Mines Company of Oregon, et al., to foreclose a trust deed or mortgage upon certain mining properties lying and being situate in the County of Baker and State of Oregon.

II.

In said suit, and on the 7th day of December, 1911, Hamilton Trust Company filed a motion based upon the bill of complaint, and the affidavit of Emmett Callahan, then attorney for The Cornucopia Mines Company of Oregon, asking for the appointment of a receiver, and based upon such application, the court made an order appointing Robert M. Betts receiver of The Cornucopia Mines Company of Oregon, and on the 2nd day of January, 1912, said Robert M. Betts filed his bond and qualified as such receiver, and entered upon the discharge of his duties.

III.

It appears from the affidavit of said Emmett Callahan:

> "That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great, irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia Mining Claims and mines would cave in and be greatly damaged, and great loss follow by the action of the elements and the flooding of said openings in said mine and mining claims filling up with water, deteriorat-

ing, destroying and damaging said mines and mining claims, its buildings and operating plants in a reasonably estimated sum of at least from forty to one hundred thousand dollars."

IV.

That in the order appointing said Robert M. Betts as receiver, the court authorized and directed him to take immediate possession of all and singular the said real and personal property and to continue the operation of the said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as might be needful and proper in doing so; and that all persons should turn over and deliver to said receiver any and all of said property into his hands and into his control; and further, that out of the moneys which should come into the hands of said receiver from the operation of said property, or otherwise, he should pay the necessary expenses incident to the operation of said property, and hold the remainder, if any there be, subject to the order of the court herein.

V.

On the 30th day of April, 1912, a decree of foreclosure was duly entered in the suit, and it was provided in the decree that the proceeds of such sale should be applied as follows:

"*First.*

To the expenses of the sale of said property.

Second.

To the expenses of the receivership herein.

Third.

To the costs of this suit.

Fourth.

Complainant's attorney's fees.

Fifth.

Taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

Sixth.

The balance to the bondholders.

Seventh.

Any amount remaining to The Cornucopia Mines Company of Oregon."

And the decree further provided: "At the time of the execution of said deed, said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance as aforesaid, the purchaser shall be let into possession of all of the said property."

VI.

The decree also provides: "That any purchaser of the property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price should be paid in cash to provide funds for the payment of all costs and expenses incurred," etc.

VII.

On the 29th day of June, 1912, the property was sold under the decree to C. E. S. Wood as trustee for the bondholders under the trust deed or mortgage, and on the 6th day of August, 1912, the court made an order confirming the sale. On the 30th day of August, 1912, Robert M. Betts, as receiver, prepared and filed his report as such, and asked to be discharged. *Such report has never been approved and he has never been discharged as such receiver.* On the 7th day of October, 1912, Ed Rand, special master appointed by the court in the suit, executed his certain deed to C. E. S. Wood, as purchaser and trustee of the bondholders under the trust deed or mortgage, for any and all of the property mentioned and described in Finding No. XII.; and that the said C. E. S. Wood at all such times has been, and is now, one of the attorneys for Hamilton Trust Company, and at all times since the application of John L. Bisher, guardian ad litem, to intervene in this suit was filed, has been and is now one of the attorneys for Robert M. Betts as receiver.

That such deed was filed for record in the office of the County Clerk of Baker County, Oregon, on the 10th day of October, 1912.

On the 20th day of November, 1912, Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, in the suit, executed to The Cornucopia Mines Company of New York, a New York corporation, his certain deed, as such receiver, to that certain water right appropriation, application No. 2056, permit No. 1060 of the State of Oregon.

VIII.

That the receiver never executed any deed to anyone for the property specifically mentioned and described in the decree rendered in the suit, in favor of Hamilton Trust Company and against The Cornucopia Mines Company of Oregon; and that no order was ever petitioned for or made by the court, authorizing or directing the receiver to execute and deliver any deed or convey any property to any person or corporation, unless it was ordered and directed by the decree foreclosing the trust deed or mortgage.

IX.

That on the 20th day of February, 1912, Alexander McDonald executed to The Cornucopia Mines Company of Oregon his certain deed, with full covenants of title, for certain premises which are not mentioned or described in the trust deed or mortgage; and on the 1st day of August, 1912, the said McDonald executed

to the said The Cornucopia Mines Company of Oregon his certain other warranty deed, with full covenants of title, for certain premises which are not described in the mortgage; and that each of said deeds were executed by the said Alexander McDonald after the said Robert M. Betts became receiver and during the time that he was such receiver.

That on the 7th day of October, 1912, the identical day upon which the special master in chancery executed the deed to C. E. S. Wood, as trustee of the bondholders, said C. E. S. Wood, as trustee of the bondholders, executed his deed of the property so conveyed to The Cornucopia Mines Company of New York, which company is not a party to this suit of record.

X.

On the 29th of July, 1912, John L. Bisher, Jr., while in the employ of the receiver of the property, sustained serious personal injuries, and based upon a good and sufficient showing therefor, the judge before whom the cause was tried made an order appointing John L. Bisher guardian ad litem of the said John L. Bisher, Jr., and authorizing the guardian ad litem to commence and prosecute his action. On the 12th day of October, 1912, John L. Bisher, as guardian ad litem of John L. Bisher, Jr., commenced his action in the United States District Court for the District of Oregon, against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, to recover for the personal injuries alleged to have been sustained by the said John L. Bisher, Jr.

XI.

The action was founded upon the negligence of the receiver in the maintenance, construction and operation of an electric power transmission line leading from the power house of The Cornucopia Mines Company of Oregon to the quartz mill of and on the property of the company; and it was alleged in the complaint that John L. Bisher, Jr., was in the employ of the said receiver and engaged in the construction and repair of such electric power transmission line, and by reason of the faulty construction of the line, and failure to provide a safe place to work, and the neglect to use any device, care or precaution to protect him; and without his fault or neglect, and through the negligence of the receiver, John L. Bisher, Jr., came in contact with electric wires charged with a high voltage and by reason thereof sustained the injuries of which he complains.

XII.

The receiver filed an answer denying liability, and alleging he was operating as lessee, and a trial was had before a jury in said court on the 11th day of April, 1913, and the jury returned a verdict in favor of the said John L. Bisher, as guardian ad litem, and against the said Robert M. Betts, as receiver, for the sum of $12,500 and judgment was entered on the verdict.

XIII.

No part of the judgment having been paid, on the 13th day of May, 1913, and based upon a petition there-

for, a motion for leave to intervene in the pending suit was filed in said court by the said guardian ad litem. Due and legal service of such motion was made upon Emmett Callahan, attorney for the respondent in said suit, and upon Wood, Montague & Hunt, attorneys for complainant in said suit, on the 13th day of May, 1913.

XIV.

On the 29th day of May, 1913, Emmett Callahan, attorney for the respondent in said suit, filed a motion to dismiss the petition in intervention, and on that date the court made an order overruling such motion to dismiss, and that the said John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, be made a party defendant therein as a judgment lien creditor of Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, and directing that the said receiver should show cause, if any, within twenty days, why the judgment obtained by the guardian ad litem should not be paid.

XV.

As directed by the court, on the 20th day of June, 1913, Emmett Callahan, as attorney for The Cornucopia Mines Company of Oregon, filed an answer to show cause, and on the 12th day of December, 1913, a motion was made by the attorneys for the guardian ad litem to strike out parts of the answer to the order to show cause, which motion was served upon the attorneys for Hamilton Trust Company and Robert M. Betts, receiver, and filed on the 12th day of December,

1913. And on the 22nd day of December, 1913, the court made an order to the effect that such motion, in all things and respects "shall be and is hereby sustained;" and in addition thereto made and prepared certain findings, which are set out in full on pages 130 to 145 inclusive of the Transcript of the Record.

XVI.

On the 8th day of June, 1914, attorneys for the guardian ad litem filed a motion to vacate the sale of said property, which was served upon opposing counsel on the 6th day of June, 1914, and filed with the clerk of the 8th day of June, 1914.

XVII.

Thereafter the court made an order directing the receiver to appear and be examined in open court as to his actions under such receivership, and on the 10th day of July, 1914, the receiver did so appear and was examined, and the report of his examination is found on pages 181 to 235, inclusive, of the Transcript of the Record.

The court also made an order directing C. E. S. Wood, as trustee of the bondholders, to make a report of his actions as such trustee, which report is found on pages 245 to 247, inclusive, of the Transcript of the Record.

XVIII.

On the 10th day of July, 1914, the court rendered a decree in this suit, of which finding No. XI., on page 159 of the Transcript of the Record, is as follows:

> "That at the time of the injury upon which the judgment against the receiver is based, the said John L. Bisher, Jr., was in the employ of the said Robert M. Betts as receiver, and that the said Robert M. Betts, as receiver, was in the possession of, and operating, maintaining and preserving the property under the orders of this court, and that the claim for such injuries was based upon and arises from and grows out of an operating charge and expenses against the said property under and during such receivership; and as such, the claim of the said John L. Bisher, as guardian ad litem of John L. Bisher, Jr., against Robert M. Betts, as receiver, and the judgment upon which it is based, is superior in right and prior in time to any lien created by the mortgage or deed of trust executed by The Cornucopia Mines Company of Oregon to the said Hamilton Trust Company, as to any and all property specifically mentioned and described in such trust deed or mortgage, and as to any and all property thereafter acquired by the said Robert M. Betts, as receiver, or any property thereafter acquired by the corporation during his receivership, or any improvements or betterments placed thereon."

Clause No. III. of such decree, found on page 166 of the Transcript of the Record, is as follows:

> "A lien is hereby declared in favor of the said John L. Bisher, as guardian ad

litem of John L. Bisher, Jr., for the injuries sustained by the said John L. Bisher, Jr., on the 29th day of July, 1912, and the claim based thereon evidenced by the said judgment, for the amount thereof and costs and accrued interest thereon, and such lien is hereby declared to be and exist upon any and all of the property mentioned and described in said trust deed or mortgage, and on any and all property thereafter acquired by the said The Cornucopia Mines Company of Oregon, or the said Robert M. Betts, as receiver thereof; and that for the payment and satisfaction of said claim and lien, all of the said property is hereby seized, and any and all of said property is hereby declared to be subject to such lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien is hereby declared to be superior and prior in time and right to the said lien created by said trust deed or mortgage on any property conveyed to or acquired by the said The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as receiver thereof; and that any purchaser or purchasers of said property, or any part thereof, took their respective conveyances and acquired any title they may have thereto, subject to the said claim and the said judgment."

XIX.

The decree further ordered (Clause No. IV., found on page 167 of the Transcript of the Record):

"First.

That any and all of said property which was so conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver thereof, after the said Robert M. Betts was appointed and qualified as such receiver, as mentioned and described in finding No. II. and findings Nos. IV., V. and VI. of this decree, or such portion thereof as may be necessary, shall be sold as hereinafter provided."

"Second.

Should the proceeds of such sale be not sufficient to satisfy this decree, that any and all of the property mentioned and described in such trust deed or mortgage, and as specifically described in paragraph I. of this decree, shall be sold."

And by such decree a Special Master was appointed with power and authority and directions to make such sale, and to apply the proceeds of such sale:

"(1) To the expenses of the sale of said property.

"(2) To the satisfaction of the said claim and judgment of the said John L. Bisher, guardian ad litem, against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, and

"(3) That any amount then remaining shall be paid out and distributed upon the further order of this court."

XX.

The report of Ed Rand, special master in chancery, who sold the property, is found on page 67 of the Transcript of the Record, from which it appears:

> "The said C. E. S. Wood, trustee, then and there tendered to me in payment of his said bid, six hundred (600) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon, numbered from one (1) to six hundred (600), of the par value of five hundred ($500) Dollars each, or the total principal sum of three hundred thousand ($300,000) dollars, each bond bearing interest at the rate of 6 per cent per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand ($136,000) dollars. And I then and there accepted said bonds with the said accrued interest, in full payment and satisfaction of the bid of the said C. E. S. Wood, trustee, and then and there declared to him that I had sold to him as trustee and would convey to him as such trustee, or his assigns, the following described properties, together with all appurtenances thereunto belonging, and all the properties whatsoever, real or personal, of The Cornucopia Mines Company of Oregon, whether specifically described in the following schedule or not.
>
> (Description of property in trust deed or mortgage.)
>
> "I further report that I have delivered to said C. E. S. Wood, trustee, a copy of this report, duly signed by me, as a certificate of sale, and that I hold said bonds to be returned into the registry of this court, or otherwise, as the court may

> direct, to be cancelled, and as so cancelled to be re-delivered to respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the said C. E. S. Wood, trustee, for the said properties, and as liquidation of the indebtedness of the said The Cornucopia Mines Company of Oregon."

Notwithstanding such report of the special master in chancery, who made the sale, the said C. E. S. Wood, as trustee of the bondholders, on July 17, 1914, filed with the clerk of the court a report that, in addition to the payment of such sums by the delivery of such bonds, he paid cash for the expense of said sale of said property, in full to the date of sale, and the costs of suit and complainant's attorney's fees in full.

XXI.

It appears from the record that the property was sold under the decree to C. E. S. Wood, as trustee of the bondholders, on the 29th day of June, 1912, and the sale was confirmed on the 6th day of August, 1912; that the deed was executed by the special master, under such sale, on the 7th day of October, 1912; that while in the employ of Robert M. Betts, as receiver, John L. Bisher, Jr., was injured on the 29th day of July, 1912; that the guardian ad litem commenced his action on the 12th day of October, 1912; that Robert M. Betts, as receiver, never did execute or deliver any deed to anyone for the property mentioned and described in the decree foreclosing the trust deed or mortgage; that on the 20th day of November, 1912, such receiver did

execute his certain deed to the Cornucopia Mines Company of New York for water right appropriation, application No. 2056, permit No. 1060, of the State of Oregon.

It also appears that the decree provides that, at the time of the execution of the deed by the special master, said receiver should also execute his deed of any and all the property of the company, and that upon the execution and delivery of such deed, the purchaser shall be let into possession of all of the said property.

XXII.

The final report of the receiver has never been approved and he has never been discharged.

Under such facts, the questions presented by the record are:

First.

Did the purchaser comply with the terms and provisions of the decree under which the property was sold;

Second.

Does John L. Bisher, guardian ad litem, by virtue of his judgment against the receiver, have a lien upon the property sold under the decree which is prior in right and time to the mortgage or trust deed;

Third.

Is the judgment a lien upon property which was acquired by the receiver during the receivership, which is not mentioned or described in the trust deed or mortgage; and

Fourth.

Did the court have jurisdiction to make the Findings of Fact and render the decree from which this appeal is taken?

ANSWER TO SPECIFICATIONS OF ERROR.

I.

The court did not err in permitting the guardian ad litem to intervene in the original suit, and had jurisdiction to grant such order; and the matters and things involved in said suit were not fully or finally determined or closed by the decree of April 30, 1912, and the court or judge were not without jurisdiction to make or grant the decree of July 10, 1914.

II.

The court did not err in overruling or denying complainant's motion to dismiss and disallow the petition in intervention filed by the intervener on May 4, 1913.

III.

The court did not err in sustaining or allowing the motion made and filed by the intervener on the 12th day of December, 1913, dismissing and disallowing the answer of complainant filed on June 20, 1913, and the court and the judge did not exceed their jurisdiction and did not err in making and granting said order of date December 22, 1913.

IV.

The court did not err in rendering its decree on July 10, 1914, and ordering the property seized for the satisfaction of the judgment in favor of John L. Bisher, guardian ad litem, or in decreeing it to be a lien, based upon such claim and judgment, superior and prior in time and right to the lien created by the trust deed or mortgage on any property acquired by the receiver during the receivership.

POINTS AND AUTHORITIES.

I.

The trust deed or mortgage was executed by the special master in chancery to C. E. S. Wood, trustee of the bondholders, on October 7, 1912; and the decree under which the property was sold provides:

> "At the time of the execution of said deed, said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance, as aforesaid, the purchaser shall be let into possession of all of the said property."

II.

On November 20, 1912, Robert M. Betts, receiver, without an order of the court therefor, executed his deed to The Cornucopia Mines Company of New York for

the water right appropriation, permit No. 1060, application No. 2056 to the State of Oregon, made by him on the 3rd day of February, 1912. No other deed was executed by the receiver.

III.

On the showing and petition of Hamilton Trust Company, and with the consent of The Cornucopia Mines Company of Oregon, Robert M. Betts was appointed receiver to operate and preserve the property, and qualified on the 2nd day of January, 1912, after which the property of the corporation was *custodia legis.*

Thompson on Corporations, 2nd edition, volume 5, p. 1188, section 6372; page 1190, section 6373; page 1193, section 6375.

High on Receivers, 4th edition, page 7, section 4.

IV.

John L. Bisher, Jr., sustained his injuries while in the employ of the receiver, then in the possession and operation of the property, and his claim for such injuries accrued while the property was *custodia legis,* and is a prior lien upon such property.

Robinson vs. New York & S. I. Electric Co., 99 Appellate Division, 509, 91 N. Y. Supplement, 153; cited in the notes in 41 L. R. A. (N. S.), p. 700;

High on Receivers, 4th ed., sec. 36, page 49, and authorities cited;

Heisen vs. Binz, 147 Indiana, 284 (45 N. E. 104);

High on Receivers, 4th ed., sec. 394b, page 504;

Knickerbocker, et al., vs. McKindley Coal Mining Co., 172 Illinois, 535 (50 N. E., 330);

Thompson on Corporations, 1st ed., vol. 5, sec. 7151, page 5672;

Vandalia Ry. Co. vs. Keys (Indiana), 91 N. E., 173-175;

Houston & Texas Cent. R. Co. vs. Crawford, 31 S. W., 176;

Knickerbocker vs. Benes, 195 Illinois, 434;

Thompson on Corporations, 2nd ed., vol. 5, page 1257, sec. 6457;

High on Receivers, 4th ed., page 336, sec. 286a.

V.

The court did not have authority to set aside the sale or the confirmation or the deed, but did have authority to order another sale of the property to satisfy Bisher's lien.

Farmers' Loan & Trust Co. and Elijah Smith, Receiver and Trustee, vs. Henry L. Newman, 127 U. S., 649 (Book 32 L. C. P. Co., 303.)

VI.

The court's findings on December 22, 1913, were made "from the records, files and proceedings in this suit," and the supplemental findings and decree of July 10, 1914, were made and rendered after taking the testimony of Robert M. Betts, receiver, and after "having heard the arguments and statements of counsel for the respective parties, and having read and examined the records, files and proceedings in this suit."

VII.

During his receivership, as appears from his report, the receiver placed betterments and improvements on the property of the value of $12,714.26, and as appears from his testimony, acquired the lands on which the power house was constructed, and constructed the power plant thereon, of the value of $20,000, and constructed a pipe line of the value of $10,000, and installed a cyanide plant of the value of $70,000 or $80,000, and made an application, and was granted a permit, for a water right from the State of Oregon; and appellee's claim would be a prior lien upon any and all property so acquired and constructed, and upon any betterments or improvements made on the property during the receivership. (See authorities above cited.)

ARGUMENT ON MOTION TO DISMISS APPEAL.

By whom and for whom is this appeal taken? It appears from the record that the trust deed or mortgage was executed by The Cornucopia Mines Company of Oregon to the Hamilton Trust Company, a New York corporation, in 1905, to secure an authorized bond issue of $300,000, and that the bonds were issued and sold; and, for failure to pay interest, at the instance and request of the bondholders, the Trust Company brought suit to foreclose, in which it applied to the court for a receiver. A decree was rendered, which, among other things, provided:

> "That the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price should be paid in cash to provide funds for payment of all costs and expenses incurred herein," etc.

It appears from the report of the sale, made by the special master in chancery, that C. E. S. Wood, as trustee for the bondholders, bid the sum of $432,000, etc., and that:

> "The said C. E. S. Wood, trustee, then and there tendered to me in payment of his said bid, six hundred (600) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon,

numbered from one (1) to six hundred (600), and of the par value of five hundred ($500) dollars each, or the total principal sum of three hundred thousand ($300,000) dollars, each bond bearing interest at the rate of 6 per cent per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand ($136,000) dollars. And I then and there accepted said bonds with the said accrued interest in full payment and satisfaction of the bid of the said C. E. S. Wood, trustee," etc.

And it appears from the decree:

"That there is now due and owing to the complainant as trustee from said respondent, The Cornucopia Mines Company of Oregon, on account thereof, said sum of $300,000, with interest thereon at the rate of 6 per cent per annum, payable semi-annually, from the 1st day of October, 1905, and the further sum of $1,192.93, taxes paid by the complainant, as provided by the terms of said mortgage, upon the property covered thereby, with interest thereon from the 15th day of March, 1912, the date of said payment, at the rate of 6 per cent per annum, and the further sum of $10,000, which is by the court adjudged to be a reasonable sum to be allowed as attorney's fees for the benefit of the complainant herein."

And it appears from the report of C. E. S. Wood, trustee:

"That at said sale, as aforesaid, I, C. E. S. Wood, as trustee, became the purchaser of said described real and personal property for the sum of $432,000, and

> delivered to the said special master of this court the first mortgage bonds in the sum of $300,000 and accrued interest on said bonds in the sum of $136,000, as provided and decreed by this court in its said decree of April 30, 1912, in the above entitled suit, and that in addition to the payment of the foregoing sums, I paid cash expenses of said sale of said property in full to date of sale and costs of this suit and complainant's attorney's fees in full."

It thus appears that any and all bonds which were issued to Hamilton Trust Company under the trust deed or mortgage have been fully paid, surrendered and cancelled, and the costs and attorney's fees are satisfied in full. What interest does Hamilton Trust Company now have in this proceeding? What interest does Hamilton Trust Company now have in the property mentioned or described in the trust deed or mortgage? What interest does Hamilton Trust Company now have in any one or either of the bonds issued under such trust deed or mortgage? Why should Hamilton Trust Company seek to defeat the payment or collection of Bisher's claim or judgment? Bisher's claim or judgment is not a claim against Hamilton Trust Company.

Bisher's judgment is against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, and based upon his judgment against the receiver, Bisher is seeking to enforce an equitable lien upon the property which was acquired by the receiver during his receivership, and upon the property which was mentioned and described in the trust deed or mortgage to

the Hamilton Trust Company. Such a proceeding could not and does not concern the Hamilton Trust Company, for the reason that it no longer has any interest in such property, and any and all of the bonds which were secured by and issued under such trust deed have been surrendered and cancelled.

An appeal was taken by the receiver from the Bisher judgment, and its validity was sustained and the judgment was affirmed in an opinion rendered by his honor, Judge Gilbert, in this court last May. The judgment against the receiver is valid and binding, not only as to the receiver, but as to The Cornucopia Mines Company of Oregon for any of its remaining property. The Cornucopia Mines Company of Oregon cannot dispute the validity or the binding force and effect of the judgment against the receiver.

While it is true that the decree from which this appeal is taken was rendered in a suit *in* and to which Hamilton Trust Company was a party, it is also true that no decree of any kind was rendered *against Hamilton Trust Company.* Neither was any *decree* rendered against The *Cornucopia Mines Company of Oregon* or *Robert M. Betts, receiver.* The substance and legal effect of the decree is to make Bisher's claim an equitable lien up the *property* specifically mentioned and described in the trust deed or mortgage executed by The Cornucopia Mines Company of Oregon to Hamilton Trust Company, and upon any property acquired by the *receiver during the receivership,* and directing said property to be sold and the proceeds applied to the payment of such equitable lien, and that such equitable

lien is prior in right to the lien created by such trust deed or mortgage.

It appears from the record that on the 7th day of October, 1912, the special master in chancery, pursuant to the terms of the original decree, executed his deed of the property mentioned and described in the mortgage to C. E. S. Wood as trustee for the bondholders, and that concurrent with the execution of such deed, the said C. E. S. Wood, as trustee, executed his certain deed of the same property to The Cornucopia Mines Company of New York, and that on November 20, 1912, the receiver, *without the knowledge or an order of court,* executed to The Cornucopia Mines Company of *New York* his certain deed of the permit for the water right from the State of Oregon. No other conveyances have ever been made.

The Cornucopia Mines Company of *New York* is not a party to this suit or proceeding. No decree of any kind was rendered against the Hamilton Trust Company. No decree of any kind, not even for costs, was rendered against The Cornucopia Mines Company of Oregon or Robert M. Betts, receiver, the remaining parties to the suit. The decree simply adjudges that Bisher has a prior equitable lien, and that the property be sold and the proceeds of the sale be applied to the payment of such equitable lien; no more, no less. In other words, it is a decree *in rem* against property which, on the 7th day of October, 1912, was conveyed to The Cornucopia Mines Company of *New York,* which company is not a party to this suit or this decree.

Under the order of the court, Robert M. Betts was appointed as receiver of any and all of the property of The Cornucopia Mines Company of Oregon, and under the record the court is now in posession and control, through its receiver, of any property which was acquired by the receiver during his receivership, and any property which was acquired by The Cornucopia Mines Company of Oregon after the appointment of such receiver. The claim or judgment of Bisher as against the receiver is *final* and the receiver *has not been discharged;* and, as to any property which was not conveyed under the original decree rendered in favor of Hamilton Trust Company, Bisher's claim would be a good and valid lien, and the decree from which this appeal is taken did not add to or take from the force or effect of that lien. Hence, we contend that Hamilton Trust Company has no interest in the decree which makes Bisher's claim an equitable lien upon the property conveyed to the bondholders, and that neither the receiver nor The Cornucopia Mines Company of Oregon have any legal right to question the validity of such decree, and that the *only purpose* and *intent* of *this appeal* is to ascertain and determinte, for the *use and benefit* of The Cornucopia Mines Company of *New York,* the validity of its title to the property mentioned and described in the trust deed or mortgage to Hamilton Trust Company, and for such reason the appeal should be dismissed.

What legal right has Hamilton Trust Company to appeal from the decree in favor of Bisher? What interest has it in the property upon which Bisher's claim

is adjudged an equitable lien? How is it affected by such decree? The *receiver has not appealed from such decree,* and what legal right has The Cornucopia Mines Company of Oregon to appeal from such decree? The decree provides:

> "That a lien is hereby created in favor of the said John L. Bisher, as guardian ad litem of John L. Bisher, Jr., for the injuries sustained by the said John L. Bisher, Jr., on the 29th day of July, 1912, and the claim based thereon evidenced by the said judgment, for the amount thereof and costs and accrued interest thereon, and such lien is hereby declared to be and exist upon any and all of the property mentioned and described in such trust deed or mortgage, and on any and all property thereafter acquired by the said The Cornucopia Mines Company of Oregon, or the said Robert M. Betts as receiver thereof; and that for the payment and satisfaction of said claim and lien, all of the said property is hereby seized, and any and all of said property is hereby declared to be subject to such lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien is hereby declared to be superior in time and right to the said lien created by said trust deed or mortgage, and on any property conveyed to or acquired by the said The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as receiver thereof; and that any purchaser or purchasers of said property or any part thereof, took their respective conveyances and acquired any title they may have

thereto, subject to the said claim and to the said judgment."

That is not a decree against Hamilton Trust Company; that is not a decree against The Cornucopia Mines Company of Oregon, and that is not a decree against Robert M. Betts, receiver. It is a decree against the property and the property only, and it appears from the record that Hamilton Trust Company has no right, title or interest whatever in the said property, and that *Bisher's judgment against the receiver is final;* and hence we say that neither of the parties to this proceeding have any legal right to prosecute such an appeal, and that it is taken for the use and benefit only of The Cornucopia Mines Company of New York, which is not a party to this suit, and the appeal should be dismissed.

ANSWER TO AND CORRECTIONS OF APPELLANTS' BRIEF.

I.

On page 16 of their brief appellants call attention to sections 3, 4, 6 and 7 of the report of Robert M. Betts, as lessee and receiver of the Mines Company, and that it appears from such report that he held and operated said mines under a written lease with the company from the 1st day of November, 1911, until the 1st day of November, 1912. This report was filed with the clerk on the 30th of August, 1912, and in the action at law of Bisher against the receiver, the question of his

operation under a lease was plead in his answer, and, notwithstanding such plea, the jury found that he was *operating as recciver* and judgment was rendered against him as *receiver,* and that judgment was affirmed upon appeal to this court, and is now final.

II.

On page 19 they quote the statute of Oregon upon the right of the purchaser at a sale. Nobody questions that law or the authorities cited under it, but it has nothing to do with this case. The foreclosure decree specifies when the purchaser shall have possession, and that he shall have such possession when the deed is executed by the special master in chancery, and that deed was executed on the 7th day of October, 1912; and with all due respect to counsel, there is no testimony or evidence in the record that the purchaser under the decree "immediately on the day of sale took possession of said property under the decree and the foregoing statute, and from the day of sale by operation of law, and as a matter of law, was in possession thereof; the purchaser's title and ownership vesting therein from the date of sale as a matter of law." The statute says: Such purchaser "shall be entitled to the possession of the property purchased or redeemed."

While in the absence of the decree the statute gives the purchaser the *right* to possession, the fact that he has a *right* to the possession of the property is no evidence of the fact that he *took* possession of the property, and under no circumstances in this case could the purchaser take, or would he be entitled to take, possession

of the property except under the terms and conditions of the decree, which provides: "That upon the execution and delivery of the conveyance or conveyances aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of all of the said mortgaged premises or property so conveyed to him or them, etc.," and when counsel say that "The purchaser thereat immediately on the day of sale took possession of said property under the decree, etc.," such statement is in conflict with the record and the decree, and is merely an assumption of fact which does not exist.

Again, the receiver did not surrender possession, but must have retained possession, for it appears from his written report filed on August 30, 1912, that he received bullion and concentrates, $10,258.98, and expended in the operation of the property, $7,753.74 in the month of July, 1912, and we are at a loss to understand why appellants' counsel should claim or assert that Mr. Wood, as trustee for the bondholders, took possession of the property on the 29th day of June, 1912, the date of the sale, or how he could take possession at any time prior to the 7th day of October, 1912, the date of his deed from the special master; and, as a matter of fact, there is nothing in the record which shows, or tends to show, that he took possession even on that date, or at any other time, or that the receiver has ever surrendered possession to anyone at any time.

On page 40 of appellants' brief counsel say: "The receiver was not in possession or operating the property upon which the alleged injury took place on the 28th

day of July, 1912, as the property was then in the hands of C. E. S. Wood, as purchaser under the sale that took place on June 29, 1912."

We are at a loss to understand why counsel would continue to make such statement. As stated, the judgment is against the receiver, and all such questions were litigated in the action in which the judgment was rendered; and it appears from the receiver's own report, page 86, Transcript of Record, that he operated the property for the month of July, 1912, and such statement is based upon the legal concluson of counsel and is not sustained by anything in the record.

III.

With all their diligence the able counsel have only cited one case which seems to sustain their position—Peterson White vs. The Keokuk & Des Moines R. Co., 2 N. W., 556, and the principles laid down in that decision are in direct conflict with all recent decisions, both state and federal, and the text books on receivers. It is a matter of common knowledge among attorneys that there has been a marked change in recent years in the law on questions of receivership, and, in particular, where the receiver, at the instance and request of bondholders, has been appointed to operate property pending the suit, and the principles laid down in that decision are no longer the law. And, again, there is a marked distinction between the facts in that case and the case at bar.

Counsel say: "It seems to be well established in the operation of railroads under receivership that per-

sonal injuries to employes are considered part of the operating expenses, and are entitled to payment as such out of the earnings of the property, but cannot be satisfied out of the corpus of the property," and among other authorities cite 41 L. R. A. (N. S.), 700 and 702.

In the footnotes of that case, on page 700, it is said:

> "It seems to be pretty well established that claims for damages arising *before* the appointment of a receiver, for either a steam or street railway company, are entitled to no preference over secured creditors. Thus, where torts were committed in the operation of a system of street railroads shortly prior to the receivership, claims for damages were denied priority over mortgage liens, and held rank with general unsecured claims." Citing the identical authorities in appellants' brief.

Counsel have not found and will not be able to find any authority sustaining their position on that point. In this case Bisher sustained his injuries while in the employ of the receiver, and there is a marked distinction between a claim for injuries *before* a receivership and *during* a receivership, which counsel seem to have overlooked in their citation of authorities on that point.

IV.

On page 43 in their brief appellants' attorneys say: "The mortgage foreclosed by appellant's bill in the suit provided that after acquired property and all improvements thereafter placed upon the same was to become part of the mortgaged property under the mortgage given." Property was acquired by the corporation and

the receiver after the sale, and which is not mentioned or described in the deed which was executed by the special master. How, and upon what theory, can the purchaser now claim title to property which was not mentioned or described in the decree and which was not sold? If any after acquired property was mentioned and described in the decree, there would then be merit in counsel's contention, but the purchaser has neither a legal nor an equitable claim to any property which was not mentioned or described in the decree.

The court did not order or direct a *re-sale* of the property, but it did decree that Bisher had an equitable lien for the amount of his claim, which was prior in time and right to the bondholders, and directing that the property be *sold* to *satisfy such lien.* This is not a proceeding to set aside the former decree or any sale under such decree. It is a proceeding to declare that Bisher has an equitable lien on the property for the amount of his claim, which is prior in time and right to any purchaser under the foreclosure decree, and the decree gives Bisher such an equitable lien and directs that the property be sold and the proceeds of such sale be applied to the satisfaction of Bisher's claim or judgment; and that the purchaser at such sale acquires a title superior in right and prior in time to the title of the purchaser under the foreclosure decree.

From an examination of the authorities cited by appellants' counsel, which seem to be in point on the legal questions involved in this case, it will be found that they are old and early decisions, the principles of which have been overruled by recent and later decisions.

ARGUMENT ON THE MERITS.

It appears from the record that on April 1, 1905, The Cornucopia Mines Company of Oregon executed its certain trust deed or mortgage to and in favor of Hamilton Trust Company, of New York, on the property described in such trust deed or mortgage, to secure the payment of six hundred bonds of the par value of five hundred dollars each, with interest thereon at the rate of six per cent per annum; and for failure to comply with the terms and conditions of such bonds, the Trust Company commenced a suit, in the Federal Court at Portland, to foreclose such trust deed or mortgage, and in such suit, based upon the showing and petition therefor, the complainant therein applied to the court for the appointment of a receiver; it appearing from such showing and petition for the appointment of a receiver:

> "That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great, irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia mining claims and mines will cave in and be greatly damaged and great loss follow by the action of the elements and the flooding of said openings in said mine and mining claims filling up with water, deteriorating, de-

> stroying and damaging said mines and mining claims, its buildings and operating plants, in a reasonably estimated sum of at least forty to one hundred thousand dollars."

Based upon such showing and petition, the court made an order for the appointment of a receiver of the property covered by the mortgage sought to be foreclosed, and, among other things, said order provided:

> "That said receiver do, and he hereby is, authorized and directed to take possession of all and singular the said real and personal property, wherever situated or found, and to continue the operation of said mining and other property and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so."

Also:

> "Each and every of the officers, directors, agents or employes of The Cornucopia Mines Company of Oregon, and all other persons or corporations, are hereby commanded to turn over and deliver to said receiver any and all of said property into his hands, or into his control, and every of such officers, directors, agents, employes, persons or corporations, are hereby commanded to obey and conform to such orders as may be given to them from time to time by such receiver, in conducting the operations of said property and discharging his duties as such receiver."

And under the said order the court appointed Robert M. Betts as such receiver, and he qualified and entered upon the discharge of his duties as such receiver, under such order, on the 2nd day of January, 1912, and at all times since has been, and is now, such receiver.

On the 30th day of April, 1912, the court rendered a decree foreclosing the said mortgage or deed of trust, and directing the sale of said premises, and appointed Ed Rand special master for said purpose. The decree, among other things, provides that the proceeds of such sale shall be applied as follows:

> "1. To the expenses of the sale of said property.
>
> 2. The expenses of the receivership herein.
>
> 3. The costs of this suit.
>
> 4. Complainant's attorneys' fees.
>
> 5. The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.
>
> 6. The amounts due or to become due upon the bonds secured by the said mortgage, and in case such proceeds shall be insufficient to pay in full the whole amount of principal and interest so due and unpaid on such bonds, then the proceeds shall be applied ratably upon the whole amount due, according to the aggregate thereof, without preference or priority of any part over any other part thereof.

7. The remainder, if any, to respondent The Cornucopia Mines Company of Oregon, its successors and assigns."

Also:

"That upon the completion and confirmation of any sale made under and in pursuance of this decree, unless said property shall be redeemed as by law provided, as aforesaid, shall make, execute and deliver to the purchaser or purchasers of the said property a good and sufficient deed of conveyance thereof in fee simple, which deed shall specify the property so conveyed and the sum paid therefor, and that said respondent, by its proper corporate officers, join in the execution of said deed."

Also:

"At the time of the execution of said deed the said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said The Cornucopia Mines Company, a corporation, or any interest therein, vested or standing in the name of the receiver, or to which said receiver has acquired any title or interest. That upon the execution and delivery of the conveyance or conveyances as aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of all of the said mortgaged premises or property so conveyed to him or them."

Under the terms and conditions of such decree, the said property described in the trust deed or mortgage was sold by the said Ed Rand on the 29th day of

June, 1912, to C. E. S. Wood, trustee for the bondholders, for the sum of $432,000, and it appears from the report of the said Ed Rand that:

> "The said C. E. S. Wood, trustee, then and there tendered to me in payment of his said bid, six hundred (600) first mortgage bonds of the respondent, The Cornucopia Mines Company of Oregon, numbered from one (1) to six hundred (600), of the par value of five hundred ($500) dollars each, or the total principal sum of three hundred thousand ($300,000) dollars, each bond bearing interest at the rate of 6 per cent per annum and carrying accrued and unpaid interest in the total sum of one hundred and thirty-six thousand ($136,000) dollars. And I then and there accepted said bonds with the said accrued interest, in full payment and satisfaction of the bid of the said C. E. S. Wood, trustee, and then and there declared to him that I had sold to him as trustee and would convey to him as such trustee, or his assigns, the property (mentioned and described in such trust deed or mortgage)."
>
> "I further report that I have delivered to said C. E. S. Wood, trustee, a copy of this report, duly signed by me, as a certificate of sale, and that I hold said bonds to be returned into the registry of this court, or otherwise, as the court may direct, to be cancelled, and as so cancelled to be re-delivered to respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the said C. E. S. Wood, trustee, for the said properties, and as liquidation of the indebtedness of the said The Cornucopia Mines Company of Oregon."

On the 6th day of August, 1912, the court made an order confirming the sale "and the acceptance by said Rand of said bonds and interest as full payment of the said bid by C. E. S. Wood, trustee, is hereby approved, etc."

No deed was executed by Special Master Rand of the property sold until the 7th day of October, 1912, at which time the special master did execute a deed of the property sold to the said C. E. S. Wood, as trustee for the bondholders; and on the same date, the said C. E. S. Wood, as such trustee, executed his deed of the same property to The Cornucopia Mines Company of New York. On November 20, 1912, Robert M. Betts, as receiver, executed to the said The Cornucopia Mines Company of New York his certain deed to that certain water right appropriation made by him, as such receiver, application No. 2056, permit No. 1060, State of Oregon. No other deed was ever executed to anyone by the receiver of any other property.

On July 29, 1912, John L. Bisher, Jr., a minor, was in the employ of Robert M. Betts as receiver, who was then in possession and operation of all of the property of The Cornucopia Mines Company of Oregon, and while in such employ, and at work in the construction and repair of the high tension electric line leading from the mill to the power house of the defendant company, he sustained serious personal injuries; and upon application to the trial court, his father, John L. Bisher, was appointed his guardian ad litem to commence and prosecute an action to recover for such injuries, and on the 12th day of October, 1912, such action was commenced

against Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon.

The receiver filed an answer denying all liability, and a trial was had and the jury returned a verdict against the receiver for the sum of $12,500. Judgment was entered on the verdict and an appeal was taken to this court from such judgment, and in an opinion rendered by Judge Gilbert, in May, 1914, the judgment was affirmed, and is now in full force and effect.

The judgment was rendered against the receiver, and we contend that, at the time of the injury to John L. Bisher, Jr., the property was *custodia legis,* and so remained until the 7th day of October, 1912, the date of the execution of the deed by the special master to C. E. S. Wood, as trustee for the bondholders, and that such claim, if not otherwise paid, is a charge or lien upon the corpus of the property.

No deed was ever executed by the receiver for any property except the water right, and that deed was executed on the 20th day of November, 1912, and the action on which the judgment is founded was commenced on October 12, 1912.

This receiver was appointed by the court at the special instance and request of Hamilton Trust Company, and upon the showing and petition that it was necessary that the property should continue to be operated for its preservation. We will frankly concede that, if the sale had been confirmed and the deeds properly executed, and the receiver had surrendered possession prior to the time that young Bisher sustained his injuries, we would not have a cause of action against the

receiver, and that another and a different question would be presented.

Can the bondholders who have secured the appointment of a receiver to operate and preserve the property refuse to pay the expenses of such operation, and disclaim any liability for injuries sustained by an employe engaged in such operation? We say no. Some one should compensate him for the injuries which he sustained while in the employ of the receiver.

It appears from the record that the receiver does not, and never did, have any funds with which to pay such claim. It also appears from the record that the lower court gave the Hamilton Trust Company sixty days in which to pay or cause the claim to be paid, and the only recourse left was to make it a charge or lien upon the corpus of the property.

Can it be said that a court, which, through its receiver, has in its possession and under its control property of the admitted value of $432,000, does not have the legal right or authority to enforce the payment of a claim for injuries which were sustained by an employe of the receiver who was engaged in the operation of the property under an appointment made at the request of the bondholders, who became the purchasers of the property? We say no.

If Bisher's claim or judgment cannot be collected from the corpus of the property, by whom will it be paid and from whom can it be collected? The receiver has no funds. The property described in the trust deed or mortgage of The Cornucopia Mines Company of Oregon was sold to pay the bonds which were held by

the bondholders, and was bid in by the trustee for the bondholders.

It appears from the report of the said master in chancery that he took and accepted bonds, and bonds only, for the sale of the property, and it appears from the report of Mr. Wood, as trustee for the bondholders, that he paid the costs of sale and the attorney's fees; but it does not appear from either report that a single dollar was ever paid by the purchaser for the expenses of the receivership. It does appear from the decree which was rendered in the foreclosure suit that the proceeds of the sale should be applied (1) to the expenses of the sale; (2) to the expenses of the receivership; (3) the costs of the suit; (4) complainant's attorney's fees, and it was under such decree that the property was sold.

Under his report, no money whatever was paid to the special master. From the report of Mr. Wood, as trustee, it appears that "I paid cash expenses of said sale of said property in full to date of sale; the costs of this suit and complainant's attorney's fees in full," and the decree provides that the proceeds of the sale should be applied; second, to the expenses of the receivership; third, to costs of this suit; fourth, complainant's attorney's fees; and, among other things, the foreclosure decree provides:

> "That the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price should be paid in cash to provide funds

> for payment of all costs and expenses incurred herein, and that the master return the cash proceeds of said sale to the clerk of this court and that the same be paid to the clerk of this court, and upon the completion and confirmation by this court of the sale made under and in pursuance of this decree, said clerk of this court shall pay out such moneys as follows:" * * *

We concede that Bisher did not sustain his injuries until after the sale, but he did sustain his injuries prior to the confirmation, and he did sustain his injuries while the property was in the possession of the receiver under the decree and the order of the court; and the receiver was appointed upon the showing and petition of Hamilton Trust Company, complainant, in a suit for and in behalf of the bondholders, to foreclose the trust deed or mortgage, and the property was sold to Mr. Wood as the trustee for such bondholders.

All of such matters appear of record, and yet the receiver has no funds with which to pay Bisher's claim. The property of the company has been sold; the Hamilton Trust Company refuses and neglects to pay such claim; the bondholders disclaim any liability, and appellants are now contending that Bisher has no redress, and that he should not be compensated for the injuries which he sustained.

The original proceeding was a suit in equity, in which the Hamilton Trust Company applied to the court for certain relief. The court had jurisdiction of the parties to the suit and the subject matter of the suit, and, through its receiver, the property was *custodia legis,* and the property described in the trust deed or

mortgage, by the terms and provisions of the decree under which it was sold, remained *custodia legis.*

The receiver was appointed upon the petition and showing of Hamilton Trust Company, and through its receiver, the Trust Company had legal knowledge of Bisher's injuries prior to the confirmation of the sale. The trustee for the bondholders did not acquire title to the property until the 7th of October, 1912, the date of the execution of the deed by the special master in chancery, and the decree, in legal effect, provides that the property should be in the possession of the receiver until the execution of that deed; and when the bondholders took title to the property under that deed, they took such title *cum onere* Bisher's claim.

If the receiver had not been appointed on the showing and petition of the Trust Company, for and in behalf of the bondholders, and if the property had not been sold to Mr. Wood, as trustee for the bondholders, another and a different question would be presented.

Our views as to the law of this case are well expressed by the court in the case of Robinson vs. New York & S. I. Electric R. Co., 99 Appellate Division 509, 91 N. Y. Supp., 153, cited in 41 L. R. A., N. S., page 700, and cited by appellants' counsel, in which the court says:

> "When the court took into its possession the property of the defendant, and undertook to continue the plant in operation for the benefit of judgment creditors, it did so subject to the same risks which would attach to the corporation if it continued to exercise its franchises; and among these risks was that of personal in-

juries to employes through the negligence of the agent or servants of the court. It could not continue the operation of the plant, and deny to those injured through its negligence a remedy, so long as the property in the hands of the court was adequate to discharge the obligation, for it would be a gross injustice to hold that the rights of the injured employe could be made secondary to those of creditors in whose behalf the plant was being operated; that they could take some portion of his rights and apply them to the payment of their debts. While it is true that claims for injuries occurring before the receivership are not commonly allowed a preference over the claims of others, we know of no case which is controlling here which has asserted the doctrine that creditors or holders of receivers' certificates can be preferred over the claims of those who have suffered injury through negligence while the plant was in the control of the receiver for the benefit of the creditors. On the contrary, the rule is established by authority, that damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are passed as operating expenses, and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Such claims are paid out of the net income if that is sufficient, but in the event of a deficiency, they will be paid out of the corpus. Such claims, therefore, have priority over mortgage debts, or other debts existing when the action was brought in which the receiver was appointed."

In the pending case the receiver was appointed at the instance and request of Hamilton Trust Company, acting for and on behalf of the bondholders, and at the time Bisher sustained his injuries was in possession and operation of the property, and when the property was sold, it was sold to Mr. Wood, acting as trustee for the bondholders. That is to say, that at the time Bisher sustained his injuries, the receiver was in the possession of and operating the property for and on behalf of the bondholders, and continued in such possession and operation for and on behalf of the bondholders until the 7th day of October, 1912, when Mr. Wood, as trustee for the bondholders, executed his deed of the property to The Cornucopia Mines Company of New York.

The Cornucopia Mines Company of New York has not appeared in, and is not a party to, this proceeding. The only parties of record to this proceeding are Hamilton Trust Company, The Cornucopia Mines Company of Oregon and Robert M. Betts as receiver of that company.

While it is true that, on August 6, 1912, the court made an order confirming the sale, it is also true that, at the time such order was made, the expenses of the receivership, as provided for in the decree, had not been paid; and such order of confirmation was made for the reason that the court was not advised and did not know of Bisher's injuries, and the parties in interest assumed that the claim arising out of Bisher's injuries was not a liability against the receiver, and was not and should not be charged against him as an operating expense. All such questions have been legally settled and deter-

mined by this court when it affirmed the judgment of the lower court in the case of John L. Bisher, guardian ad litem, vs. Robert M. Betts, receiver, in an opinion written by his honor, Judge Gilbert, at the last May term of this court.

The receiver has no funds with which to pay the claim; the Hamilton Trust Company has refused to pay the claim, and appellants now contend that the property should not be charged with an equitable lien for the amount of the claim, and if their position is sustained by the court, not a dollar will ever be collected on the Bisher judgment, and yet, under the law, his injuries are an operating charge of the receiver, and under the facts, the receiver was in possession of and operating the property at the special instance and request of the bondholders, and for and on behalf of the bondholders, and the bondholders, through their trustee, held a certificate of sale of the property and the sale was confirmed after Bisher sustained his injuries.

The case of Turner vs. Indianapolis, Bloomington & Western Railway Co., U. S. Circuit Court, Dist. of Indiana, Drummond, Judge, reported in 8 Bissell's U. S. Court, 7th Circuit, page 527, lays down this rule:

> "The receiver of a railroad, appointed in foreclosure proceedings, is the agent of the bondholders and the trustees, and a judgment rendered against him by a court of competent jurisdiction is binding upon the interests of the bondholders."

In the case at bar, the bondholders became and were the owners of the property, and the court was in pos-

session of the property, through the receiver, at the time Bisher sustained his injuries. The bondholders are estopped, both in law and equity, to deny Bisher's claim to a lien on the property to compensate him for his injuries. The bondholders are not innocent parties or innocent purchasers of the property. They have no legal or moral right to ask a court of equity to appoint a receiver to preserve and operate their property, and save it from loss and destruction, and induce the court, upon their own showing, to appoint a receiver for that purpose, and take a decree of sale and have the property sold to the bondholders, and have it operated by the receiver of the court, by reason of which young Bisher was injured while in the employ of the receiver, and then deny liability or refuse to pay for those injuries. Such policies and methods are a shock to the conscience of the court, and have never been approved, and will never be approved by a court of equity.

It must be conceded that, at the time Bisher sustained his injuries, he was in the employ of, and the property was operated and managed by Betts as receiver. Under Sec. 36, High on Receivers, 4th Ed., page 49, the author says:

> "Nevertheless, it may be regarded as a matter resting within the sound discretion of the court whether its receiver shall be permitted to carry on the business which has come under his control. And where it is clear that the conduct of a business by a receiver, under the supervision of the court, will be for the benefit of all parties in interest, and will result in preserving or enhancing the estate in his possession,

> courts of equity frequently authorize their receivers, for a limited period, and under the strict supervision of the court, to continue and carry on the business which has thus come into their custody and control. And the power of the court thus to authorize its receiver to continue a business carries with it, as a necessary incident, the authority to authorize him to borrow money for the purchase of all such supplies and materials as may be necessary for the proper maintenance of the business and to secure to the payment of such obligations a preference over the claims of other creditors, making them payable either out of the net income in the hands of the receiver or out of the corpus of the estate if the income proves insufficient, etc."

Under this section, many authorities are cited sustaining the rule.

Again:

> "And where a receiver is appointed at the instance and for the benefit of lien holders, who ask that he be authorized to continue a business, all charges and expenses properly incurred by the receiver in so conducting the business, are entitled to priority over the liens of plaintiffs, and are held to be a first charge upon the net earnings or upon the corpus of the estate in the hands of the receiver."

There is a marked distinction between the pending case and the case of U. S. Inv. Co., a corporation, v. Portland Hospital, decided by Judge Bean and reported in 40 Oregon, 523. In that case, on page 534 of the opinion, Judge Bean says:

"The receiver was not appointed at their request, nor upon their application, nor was there anything in the receivership proceedings to indicate to them that it was the intention to charge the mortgaged property with a preferred lien for debts contracted by the receiver. Where a mortgagee procures the appointment of a receiver with power and authority to operate and conduct the business of the mortgagor, he cannot object to the payment of the expenses incurred for such purposes in preference to his lien." Citing Heisen v. Binz, 147 Indiana, 284 (45 N. E., 104), the syllabus of which lays down this law:

"In a suit to forclose a mortgage on mining property, B. was appointed receiver on petition of plaintiff. H., a defendant holding a junior mortgage, filed a cross-complaint asking for a receiver until the year for redemption expired. An order appointing B receiver on said cross-complaint provided that he should create no indebtedness except as authorized by the court on notice to the other lien holders, such order being made after a decree ordering a sale to satisfy all liens, subject to expenses and costs. Thereafter the receiver obtained an order to borrow money from H, who was the purchaser at the sale, for the purchase of machinery and the payment of labor and to issue certificates therefor; and during the receivership the receiver incurred liabilities for labor and repairs necessary for the proper operation of the mine, rendering periodical reports to the Court and to H. Held that H could not, after the receiver had resigned and turned over the property in its improved condition, avoid liability for the receiver's expenses on the ground that they were made without order of court."

Quoting from the opinion:

> "Under all the circumstances in the case, we do not think appellant is in position to assert the propositions urged by him, even if their correctness were conceded. He should have acted promptly and not waited until the debris was removed from the mine and the machinery put in repair and the property was in good condition to be operated as a mine, and then, after receiving the same, as well as the uncollected accounts due the receiver, and the benefit of all the labor and expense, attempt to avoid the liabilities incurred for such purpose. This, equity and good conscience will not permit."

Again in High on Receivers, 4th Ed., Sec. 394b, page 504, the author says:

> "The exercise of this power rests upon the obvious principle that, the court having undertaken the management of the railway at the request and for the benefit of the mortgage creditors, all necessary expenses incurred in such management are a prior charge upon the fund or property, and constitute, in effect, a part of the necessary costs of litigation."

In Knickerbocker et al v. McKinley Coal & Mining Co., Illinois Supreme Court, reported in 50 N. E., 330, the Court says:

> "When it becomes the duty of a court of equity to take property under its own charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the re-

> ceiver for his services. He is the officer and agent of the court and not of the parties; and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control, until such expenses and allowances are paid or secured to be paid. Mr. High on Receivers, section 796, after stating the doctrine that, when a court of equity takes property under its charge by appointing a receiver, the property itself is chargeable with the necessary expenses of the receivership, says, 'And, in such case, the person who, under the final decree of the court, acquires the property or its proceeds, acquires it cum onere, and chargeable with the amounts due to the receiver for services and advances.' Etc."

Again, the court says:

> "Under such conditions the court should never surrender its custody of the property, or discharge the receiver, until all obligations incurred by him in the proper discharge of his duties have been adjusted and provided for."

The decree rendered in favor of the Hamilton Trust Company expressly provided that, first, the proceeds of the sale should be applied to the payment of the costs of sale; and, second, to the expenses of the receivership. No fund was ever provided, or any money paid into court, for the expenses of the receivership. Counsel may contend that, at the time of the sale, there were no expenses of the receivership, and for such reason it was not necessary to provide such fund, but at the time of the sale the receiver was in the possession and operation of the property, and *continued in pos-*

session and operation of the property until the *7th day of October, 1912.* The purchaser could not and did not acquire title to the property until the sale was confirmed and the deed was executed by the special master, and the property was sold to and bid in by the bondholders through a trustee; and when the bondholders, through their trustee, took title to the property, they took it burdened with any and all of the expenses of the receivership which had accured between the *date of sale* and the *execution of the deed,* including Bisher's claim.

The legal principles involved in this case are well stated in Thompson on Corporations, 1st edition, section 7151, page 5672, in which the author says:

> "In the management of this trust property, negligences are committed by his servants, for which, under the settled principles of law, the receiver is liable—not personally, except where he has been guilty of personal fault, but out of the trust funds in his hands. The liability is then essentially a liability of the fund and not of the custodian. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale for the purpose of receiving and operating the property, or whether it be the original corporations, its former owner, to whom it is redelivered under a new arrangement—it is the case of a trust property to which a liability has attached passing into the hands of a new trustee. The trust property continues liable; but in the very nature of the case, any action brought to charge it must, if

> the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is its custodian—that is to say, against the new trustee. If, on the other hand, the action has been commenced prior to the discharge of the receiver, it abates as to him upon his discharge, because the nature of the action is an action to charge the trust property in the hands of a trustee, and it can only be prosecuted against him who is the trustee, and upon the happening of that event, it must be revived against the corporation into whose hands it has passed; that is, against the new trustee. Until the courts plainly see and state, as the reason for their conclusion, that the liability attaches to the thing and that the governing principle is essentially the principle upon which courts of admiralty proceed, then they will flounder about as the judges have done in many cases, and their reasoning 'will give abundant sport to future days.' "

And this is quoted and approved in the case of Bartlett vs. Cicero Light, Heat & Power Co. (Illinois), 52 N. E., pages 339-341.

On principle, the case of Farmer's Loan & Trust Co. and Elijah Smith, Receiver and Trustee, v. Henry L. Newman, 127 U. S. 649 (Book 32 L. C. P. Co., 303, is square in point as to the power and duty of the court to order another sale of the property. In that case the court set aside:

> "The confirmation of the sale by the special master, and the order approving the deed made to the purchaser. The sale was confirmed, the deed to the purchaser approved, and the latter authorized to take

> possession, by the order of July 5, 1881. The reservations in that order did not authorize the court to set aside the confirmation of the sale and cancel the deed to the purchaser. The confirmation of the sale and the approval of the deed were, rather, subject to the power reserved, to protect and enforce, by subsequent orders, any claim or lien then pending in either that court or, by its leave, in a state court. So far as Newman is concerned, such protection can be given, and should be given only, by an order directing the entire property covered by the $1,600,000 mortgage to be sold, in satisfaction of his claim or lien, without nullifying the former sale or the confirmation thereof, and without withdrawing or cancelling the deed made by the special master to the purchaser."

And that case decided that the lower court erred in setting aside the confirmation and sale, but sustained the lien and directed that the property should again be sold to satisfy Newman's lien, and said:

> "If they do not discharge, in money, Newman's preferred lien, within a reasonable time fixed for that purpose, the property covered by that mortgage, including the leased premises, should be again sold as an entirety, or so much thereof sold as may be necessary, to raise the amount, principal and interest, due him, together with his costs in the court below from the time he filed the petition of intervention."

On principle, this sustains the position of the lower court in the pending case, and is authority for the order of sale of the property which was made by decree of his honor, Judge Wolverton.

PROPERTY ACQUIRED BY THE RECEIVER.

It appears from the record that the receiver acquired the lands from McDonald and constructed a power plant on such lands, and acquired a water right from the State of Oregon, and that neither the lands nor the water right so acquired are mentioned or described in the trust deed or mortgage executed to the Hamilton Trust Company. Also, that during his receivership, he constructed a cyanide plant at a cost of about $70,000 on the property mentioned and described in the trust deed or mortgage.

The decree from which this appeal is taken, among other things, provides; paragraph IV, page 167 of the Transcript of Record:

> "*First.*
>
> That any and all of said property which was conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver thereof, on and after the said Robert M. Betts was appointed and qualified as such receiver, as mentioned and described in Findings No. II, IV, V and VI of this decree, or such portion thereof as might be necessary, shall be sold as hereinafter provided.
>
> "*Second.*
>
> Should the proceeds of such sale be not sufficient to satisfy this decree, that any and all of the property mentioned and described in such trust deed or mortgage, and as specifically described in paragraph I of this decree, shall be sold."

During the receivership, Alexander McDonald executed to The Cornucopia Mines Company of Oregon three different deeds to property, each of which contained different descriptions, but each of which contained portions of the same description of the other deeds, and each of which was intended to describe and convey about five acres of ground.

Page 183, Transcript of the Record:

> "Q. When did you come to an agreement with him for this purchase?
>
> A. The latter part of February, 1912. Now, I would like to say this in regard to this: There seem to be three deeds. The way that occurred, there was some placer mining going on, and for fear that these men who wanted placer ground might tie McDonald up, I got him to deed me five acres of ground; but it was later determined, when the pipe line was surveyed, that the ground covered by the original deed did not quite cover the ground on which we wished to place the power house. Then another deed was made to cover this."

The deed which was executed on July 16, 1912, conveys:

> "Also a right of way for the pipe line of The Cornucopia Mines Company of Oregon, over and through that certain portion of the lands described as follows: The SE¼ of the NW¼, the NE¼ of the SW¼, the SE¼ of the SW¼ of Section 3, for said distance of 3,500 feet, more

> or less. The above described premises and right of way are in Tp. 7 S., R. 45 E. W. M. Said pipe line to be used for electric and power purposes."

The deed executed on August 1, 1912, in addition to the land, conveys:

> "Also a right of way 25 feet in width for pipe line and transmission line from the south line of NE¼ of NW¼ through the SE¼ of the NW¼, the NE¼ of the SW¼, the SE¼ of the SW¼ of Section 3, Tp. 7 S., R. 45 E. W. M., and to be located according to surveys, agreed upon by said Alexander McDonald and Robert M. Betts, receiver for The Cornucopia Mines Company of Oregon. The length of this line is not to exceed 3,700 feet."

It also appears that, upon the application of Robert M. Betts, as receiver of The Cornucopia Mines Company of Oregon, a permit, No. 1060, was granted to him as such receiver by John H. Lewis, State Engineer, and approved on February 28, 1912, for a certain water right of 9 1/3 cubic feet per second, and that it was to be applied to power for mining purposes to the extent of 500 horespower; that such power would be developed by an electric plant with Pelton wheels, and the works are to be located in the SE¼ of the SW¼ of Section 3, T. 7 S., R. 45 E. W. M., and the power is to be applied in "running quartz mill and compressors;" and the nature of the mines to be served is Cornucopia Mines Company. And it appears from such application that "Construction work will begin on or before June 1, 1912, and will be completed on or before October

15, 1912, and the water will be completely applied to the proposed use on or before November 1, 1912."

It also appears from the record that the receiver, without any order, and without even any knowledge of the court on the 20th day of November, 1912, executed his deed for such water right application and permit, as receiver, to The Cornucopia Mines Company of New York. It also appears from the testimony of the receiver that the power plant was constructed on the land specifically described in the third, or last, deed from Alexander McDonald to The Cornucopia Mines Company of Oregon, at a cost of about $20,000.

Page 206, Transcript of Record:

> "Q. Now, Mr. Betts, after you made these water filings and purchased this property from Mr. McDonald, what, if anything, was done with the filings? What did you do with them?
>
> Q. Well, did you make any improvements on them?
>
> A. On the ground that I bought from McDonald?
>
> Q. Yes.
>
> A. Yes sir.
>
> Q. What did you do?
>
> A. Built a power house.
>
> Q. When did you do that?
>
> A. About September, 1912.
>
> Q. And what is the value of those improvements? What did they cost?

A. About $20,000.

Q. Power house, you say?

A. Yes sir.

Q. For the purpose of generating power?

Page 207:

A. Yes sir.

Q. Is power generated there now?

A. Yes sir.

Q. And when did you commence the construction of that power house on that ground that you bought of McDonald?

A. In August or September, 1912.

Page 227:

"Q. Now, Mr. Betts, on what particular piece of land is this power house situated? Just point out in the deed there.

A. It is constructed on the ground bought from McDonald.

Q. I know, but ground described in which deed?

COURT: The first, second or third deed?

A. The third deed, the deed of August 1st. That was determined by the final survey.

Q. Upon what lands is the cyanide plant constructed?

A. On the old ground, the ground covered by the mortgage.

Q. And that cyanide plant you say cost about $70,000?

A. Yes sir.

Page 228:

Q. Now, this power plant that was constructed on this land. Where did you get the machinery for that?

A. In San Francisco—in San Francisco and New York.

Q. Now, when this water filing, or permit rather, was obtained from the office of the State Engineer, was there a ditch or flume-line then extended?

A. Yes, it was all built. The flume had been there for years.

Q. And you rebuilt it?

A. No. You see, Mr. Johns, the flume came about a mile down the creek, which gave about 300 feet fall. But that was not sufficient, so at the end of the pipe line, where the old power house was situated, we put in a "Y," and carried this water under pressure farther down the creek, until we got about a 500 foot fall, which increased the pressure, thereby increasing the horse power.

Q. You took it down by pipe instead of flume?

A. Took it down by pipe, yes sir.

Q. And how much pipe was put in there?

A. In the neighborhood of 3,500 feet.

Q. And what did that cost?

A. About $10,000 delivered.

Page 230:

Q. Now, tell the court where you got the money to make those expenditures, and to pay for the improvements, and the machinery specifically?

A. It was sent me from Mr. Lawrence's office, and aggregated up till about the 1st of September some $83,000.

COURT: Up to what year?

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes sir, prior to the receivership and during the receivership.

It thus appears that the present power house is constructed upon land which was purchased by the receiver from McDonald, and that the water right application was made by and the permit granted to the receiver, and that the power house was constructed during the receivership at a cost of about $20,000; and

that the pipe line was extended and constructed at an estimated cost of $10,000; and that a cyanide plant was constructed at a cost of about $70,000 or $80,000, and that none of said property is embraced or specifically described in the mortgage, and that the power house and pipe line are on real property which was acquired by the receiver, and not in any manner mentioned or described in the mortgage, and the same thing is true of the water application and permit. None of said property is mentioned or described in the deed which was executed by the special master to C. E. S. Wood as trustee for the bondholders, and the decree expressly provides that all property which was conveyed to or acquired by the said The Cornucopia Mines Company of Oregon, or the receiver, on or after the date he was appointed and qualified as such, should be sold first, and that if the proceeds of such sale should not be sufficient to satisfy such decree, the property which is specifically described in the trust deed or mortgage could then be sold. And in any event, and under any theory of this case, Bisher is entitled to collect his judgment from any and all property which was not sold under the original decree and conveyed by the special master to C. E. S. Wood, trustee for the bondholders.

Under the facts as disclosed by the record, the effort to defeat Bisher's lien will never appeal to a court of equity and will shock the conscience of the court.

In the answer to the Bill of Intervention, among other things it is alleged (bottom of page 122 Transcript of Record) that on the 7th day of October, 1912, C. E. S. Wood, as trustee for the bondholders, did make, ex-

ecute, acknowledge and deliver to The Cornucopia Mines Company of New York a deed, in and by which he conveyed any and all of the property sold and conveyed to him by the special master in chancery, and "said Cornucopia Mines Company of New York is in no wise connected with The Cornucopia Mines Company of Oregon, respondent in this action, but is composed in large part of the general purchasers and owners of the mortgage bonds of The Cornucopia Mines Company of Oregon, which were foreclosed in this action in this court."

Prior to the rendition of the decree from which this appeal is taken, the receiver was called as a witness and testified:

Page 210, Transcript of Record:

"Court: What explanation do you want to make?

A. I was going to say that the lease was given me primarily so that I could go ahead and carry on this work with greater expedition, and so that my hands would not be tied. All the men connected with the concern lived in New York, and they had no head office, and the lease was given to me more with that in view, so that I could go ahead with a free hand.

Court: Then, you were operating in effect for the lessor?

A. For the company, yes.

Court: Well, was it the New York company or the Oregon company?

A. No, the New York company. It wasn't a company at that time at all. It was a group.

Court: And in this case, although you were lessee of these mines by written contract, you were virtually the manager for the New York company.

A. Well, there was no——

Court: I am asking you if that was the effect?

A. Yes sir. There wasn't any company.

Court: But you were the manager?

A. For men in the east.

Court: I mean for a company that was to be organized?

A. Yes sir.

Page 211:

Court: That is, for the promoters of the company?

A. Yes sir.

Court: That was your real position?

A. Yes sir.

Q. And that company was afterwards reorganized as The Cornucopia Mines Company of New York?

A. Yes sir.

Q. Now Mr. Betts, have you any funds in your possession as receiver?

A. No sir.

Court: You haven't made any report, have you, as to the funds paid into court to comply with the sale?

Mr. Callahan: No, we are expecting Mr. Betts to make that report now. He hasn't any money. I supposed that was understood.

Court: Well, there were certain funds to be paid into court to pay the costs until the costs were satisfied, and until the claim against the estate which was prior to the mortgage was satisfied under the terms of the sale, and I think a report ought to be made of that, to inform the Court what has been done.

Mr. Callahan: Oh, yes, I will make that report; but Col. Wood paid the costs and took care of that.

Court: It ought to have gone through court proceedings, so the Court would know.

Page 212:

Court: Is the master's report filed, and does that contain that information?

Mr. Johns: No sir, there is no such information in the master's report.

Mr. Callahan: I don't know that it does in detail, but some way it indicates that it is paid, or Col. Wood has made the statement that he paid it in greenbacks. I know the clerk's costs were paid, because he returned me some funds—$10 or $12 or such a matter—of a surplus by his check. He did that very recently, within the last few months.

Mr. Johns: I don't want to testify, your Honor, but if it is necessary I will go into that. The master's report shows there was not a single dollar of money paid over to the master from this sale; that the property was bid in for the bonds, and the bonds only; and the confirmation shows it, too.

Court: That is the very reason why this Court is inclined to allow this procedure by which an execution may go against this property for a resale. The order of the Court provided, when the sale was made, that the purchaser might pay in bonds, but the expenses and costs of the sale, and by my rendition of the order of sale, the expenses and costs of the receivership should first be paid. The purchaser has not compiled with that order. The purchaser has not paid the costs of the receivership, which I think to be legitimate costs, including this demand. And I think there ought to be a report made as to what was done in that respect, and what money was paid into court, and why this other money was not paid.

Page 213:

Court: I think the report ought to go to the full extent, so as to inform this Court just what was done; and if there has not been money paid into the court for the purpose of taking care of the receivership, it ought to be paid in now.

Mr. Callahan: That is true, but if the Court will remember this: The property was sold on the 29th day of June under the master's sale, and Mr. Betts, of course, received no compensation as receiver, because he received his compensation out of his lease, and not made out of the lease, he received $350 as his commission in this report here.

Court: It appears now that he was acting for the promoters of this second company, the New York company.

Mr. Callahan: That is true. He had a written lease of that character.

Court: I suppose if this judgment had been against him as lessee, that fact would not have come to light at all.

Page 214:

Court: There has been no report made to this Court. The Court has not been informed at all.

Page 216:

Q. What consideration did you receive for making that deed to The Cornucopia Mines Company of New York?

A. The consideration, I think, in the deed was $1 and other valuable consideration.

Q. Well, what consideration did you receive for making it?

Court: What was the actual consideration?

A. That is all. There was no money—no other money paid; no money paid.

Q. Is there anything in that decree directing you to execute a deed to any property to The Cornucopia Mines Company of New York?

A. No sir. But as I understood the matter, it was transferred by the mortgage—the mortgage covered that; but that it was necessary in order to perfect the title to have the deed.

Q. Where did you get that information?

A. I got it from talking with the lawyers, and from the mortgage itself.

Page 222:

Q. You have been paying yourself as lessee a salary of $350 a month during the time you were receiver?

A. Yes, sir. That was understood, I think, because I was to receive no compensation as receiver.

Q. Did you ever apply to the Court for an order for that?

A. It was in the original order that I was to receive no compensation as receiver.

Q. Well, did you ever apply to the Court for an order fixing your compensation that you were to have from anyone?

A. Why, no. I didn't think it was in the Court's jurisdiction—that was all. I had been receiving it right along.

Page 223:

Q. You thought the Court had nothing to do with that?

A. Why, no. I had been receiving that before the receiver was ever thought of.

Q. With whom did you have this understanding that you were to receive $350 a month?

A. Benjamin B. Lawrence, of New York.

Q. Who is he?

A. He is a mining engineer.

Q. What relation does he sustain to The Cornucopia Mines Company of New York?

A. He is consulting engineer of the company today.

Q. One of the stockholders?

A. Yes, sir.

Q. An officer in the company?

A. I think he is vice-president.

Court: Who is the manager of this company:

A. I am.

Court: You are the manager?

A. Yes.

Court: With authority to do all things necessary to the operation of the mine?

A. Yes, sir. That is except where it requires a resolution of the board; that is, in making deeds and things like that.

Court: Yes, I understand.

Q. When did you first enter into the employ of these people under the arrangement that you have been testifying about?

A. In November, 1910.

Page 224:

Q. You have been working for the same people all the time ever since?

A. Yes, sir. Would you like to have this cleared up a little more.

Q. I will clear it up. When did you cease your employment for The Cornucopia Mines Company of Oregon?

A. When the receivership started.

Q. And when did you enter on your employment for the Cornucopia Mines Company of New York?

A. When it was formed.

Q. When was that?

A. November, 1912. Well, that is at the termination of the lease. The lease was not renewed after that. All this construction work had been completed, and things were settled down in a quiet state.

Q. Who completed this construction?

A. I completed it.

Q. I know, but for whom were you acting during that period?

A. For these men in New York.

Q. Well, what men?

A. Well, I don't know the names of but two of the men connected with it. It was a syndicate of men that the new company was formed of.

Page 225:

Q. Well, who was it?

A. Yes and no. There are a lot of new men in it now. That is one thing I thought I would clear up if possible.

A. The Searles estate owned or controlled the stock, I think, of the old company and some of the bonds; and the Court ordered this estate to be closed up.

Court: Back there?

A. Back there. And the administrator came to Mr. Lawrence and said 'This has to be sold at a certain date,' and asked him if he would buy it in, and Mr. Lawrence said he would. Now, after they bought in this stock which was held by the Searles estate, they were unable to get some of the rest of the stock, and this Laubenheimer judgment came up, and they bought the bonds. It was easier to buy the bonds than the stock. And Mr. Laubenheimer had a judgment against the company for some $12,000.

Q. The Cornucopia Mines Company of Oregon?

A. Of Oregon. So they decided to foreclose these bonds, and clear up all the litigation and these other claims, and have the property in good shape.

Court: It was your intention, then, to clear up all the matters against this estate?

Page 226:

A. Yes. Try to make it at least mineable. It had always been in litigation before.

Court: It was also your intention to take care of the receivership charges in closing out this business.

A. Now, of that I had no knowledge, you see. That is, how do you mean?

Court: It was also the intention of the promoters, when the receiver was appointed, to take

care of the costs and charges and expenses of closing out the receivership?

A. Yes, sir.

Q. So as to get a clear mine?

A. Yes. And so they advanced money. Now, who these friends of Mr. Lawrence's were, I do not know. I had known Mr. Lawrence for years, and he had confidence enough in me to say 'Here, you can handle this better to have a lease on it, because we have no organization back here and on account of the short summer seasons this work might have to be rushed, and we would prefer to give you a lease on it, so that you will not be bothered with'—

Q. Getting orders from headquarters?

A. Getting orders from headquarters.

Page 230:

Q. Now, tell the Court where you got the money to make these expenditures, and to pay for these improvements and the machinery, specifically?

A. It was sent me from Mr. Lawrence's office, and aggregated up till the first of September some $83,000.

Q. What year?

A. 1912.

Court: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir. Prior to the receivership and during the receivership.

Page 231:

A. I thought the matter had been merely cleared up, and that my receivership was awaiting its course on the docket to be discharged.

Court: Well, it would have been discharged had it not been for this judgment against you as receiver."

There is another angle to this case which should give Bisher an equitable lien. It appears from the report of the receiver (Transcript of Record, pages 77, et seq.), that his gross receipts from the operation of the property from January 1, 1912 to August 1, 1912, were $70,899.46, and that during such period his expenditures were $71,681.27. The receipts were from bullion and concentrates derived from the operation of the mine.

The nature and purpose of the expenditures are all evidenced by numbered vouchers which are now on file in the clerk's office in the lower court, and from which it appears that the last item of the report for each month is for and on account of labor. The report also gives an itemized statement of the amount of bullion and concentrates for each month.

In our brief on the former appeal in this case, on pages 29, 30 and 31, is a statement of the items, evidenced from the vouchers by number, from which it appears that the receiver, between January 1 and August 1, 1912, expended the sum of $12,714.26 for sup-

plies for the necessary operation of, and betterments and improvements on, the property.

Such facts all appear from the receiver's report and his vouchers on file with the clerk of the lower court. That is to say, that exclusive of the money expended in the construction of the power plant and the pipe line and the cyanide plant, the receiver, between those dates, made other betterments and improvements on the property to the value of $12,714.26, which does not include his salary as receiver between those dates, amounting to $2,620.75, and which was paid out of the proceeds of such bullion and concentrates without any order or authority of court.

It thus appears that, during his receivership and prior to the 1st day of August, 1912, the receiver placed betterments and improvements on the property of the value of $12,714.26, which the bondholders now claim to have acquired under the foreclosure sale, in addition to the land which was purchased by the receiver for the power house, and the power plant which was constructed upon the land at a cost of $20,000, and the pipeline which was constructed at a cost of $10,000, and the cyanide plant which was constructed at a cost of about $70,000 or $80,000.

How and in what manner did the trustee for the bondholders acquire title to all of such betterments and improvements which were acquired and constructed by the receiver, and what right have they to deny an equitable lien upon the property in favor of Bisher? The bondholders, through their trustee, purchased the property on the 29th day of June, 1912, and yet they deny

Bisher an equitable lien on, and claim title to, all the property mentioned and described in the trust deed or mortgage, together with any and all other property, and betterments and improvements placed thereon by the receiver after the date of sale.

From the records it conclusively appears that, at the time of the sale, Mr. Wood purchased the property as trustee for the bondholders under the original trust deed or mortgage, and that Robert M. Betts was appointed as receiver on the showing and petition of Hamilton Trust Company, to operate and preserve the property pending the foreclosure suit, for the use and benefit of the bondholders, and that the property was sold to a trustee for the bondholders, and that in legal effect, The Cornucopia Mines Company of New York is nothing more than a reorganization of The Cornucopia Mines Company of Oregon by the bondholders of The Cornucopia Mines Company of Oregon, and for their use and benefit, and that The Cornucopia Mines Company of New York is 'composed in large part of the general purchasers and owners of the mortgage bonds of The Cornucopia Mines Company of Oregon."

It appears from the record that the purpose of the suit was to get rid of the Laubenheimer judgment, and sell the property and reorganize the company with substantially the same bondholders, and that pending the suit, and to protect the property, it was necessary to have it operated by a receiver, and at the instance and request of the parties in interest, and based upon a petition therefor, Robert M. Betts was appointed as such receiver. Prior to his appointment he was manager of

the property of The Cornucopia Mines Company of Oregon, and after his appointment as receiver, he was really acting for and in the interest of the bondholders' committee, which afterwards organized—The Cornucopia Mines Company of New York, to which Mr. Wood, as trustee for the bondholders, conveyed the property on the 7th day of October, 1912.

John L. Bisher, Jr., a boy of about 18 years of age, was in the employ of the receiver, and on the 29th day of July, 1912, sustained serious personal injuries from which he will never recover, including the loss of an arm and severe injury to the other, and for which a jury in the Federal Court gave his guardian ad litem a verdict for $12,500, nearly two years ago; and all of the parties in interest disclaim liability, and apparently are combined in their efforts to defeat the payment of his claim, and for that purpose joined in an appeal to a court of equity. Under the facts in this record, they are all estopped, as against Bisher's claim, to claim or assert that they are purchasers in good faith of this property.

The fact remains that Bisher sustained serious personal injuries, and nearly lost his life, while in the employ of the receiver, and that the receiver was appointed to operate, protect and preserve the property for the use and benefit of the bondholders, and that the property was sold to a trustee for the bondholders, and was by that trustee conveyed to The Cornucopia Mines Company of New York which "is composed in large part of the general purchasers and owners of the mortgage bonds of The Cornucopia Mines Company of Oregon."

We will concede that "The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree," as counsel in bold type assert, but we also claim that such a decree should be construed by all the facts as disclosed by the record, and in accord with equity and good conscience, and when so construed, Bisher is entitled to an equitable lien.

It is a matter within the knowledge of this Court that judgment was rendered in the case of John L. Bisher, guardian ad litem, vs. Robert M. Betts, receiver, after a trial of that case by His Honor, Judge Charles E. Wolverton; that an appeal was taken from that judgment which was afterwards affirmed by this Court; and that the decree from which this appeal was taken was rendered by the same judge, who had access to and personal knowledge of all of the records and proceedings in both cases, and that after a full investigation thereof that same Judge rendered the decree from which this appeal is taken, and from an examination of such records, it conclusively appears that the appellants have no standing in a court of equity, and that as a matter of both legal and equitable right, Bisher should have and does have a lien on the property to the amount of his judgment.

If the contention of appellants' counsel is true, and the title to the property passed on the 29th of June, 1912, the date of the sale, and the receiver surrendered the possession and operation of the property and had no funds or property in his hands as such receiver, why did he contest, and employ able counsel to defend, that action against him, and why did he prosecute an appeal

to this Court from the judgment rendered in that action? Why is this appeal now taken and prosecuted by The Hamilton Trust Company, which has no interest in the result of this case? There is no equity in appellants' case, and from a study of the records it becomes more and more apparent that the bondholders under the trust deed or mortgage are the real parties in interest, and through able counsel are seeking to defeat the just claim of a minor boy who was made a cripple for life while in the employ of the receiver, who was appointed by the Court at their request to protect and operate and preserve their property.

The appeal should either be dismissed, or the judgment affirmed on its merits.

Respectfully submitted,

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